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Supreme Court of the United States

October Term, 1974
No. 74-1563

THE CITY OF EASTLAKE, *et al.*,
Petitioners,

vs.

FOREST CITY ENTERPRISES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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STATEMENT OF THE CASE AND QUESTION PRESENTED

While the facts as set forth by petitioners are embroidered with occasional conclusions and for that reason tend to be somewhat inaccurate, petitioners' Statement of the Case, particularly as amplified by the opinion of the Court below, is adequate for present purposes.

Petitioners' statement of the Questions Presented for Review is less acceptable. While the issues at stake may be gleaned by ignoring the conclusionary phraseology in the Questions posed by petitioners, the basic issue is more succinctly and accurately stated as follows:

Is an owner of land deprived of due process by a requirement that any change in use of his land, although duly authorized by all appropriate municipal administrative and legislative bodies, must, *as a precondition to effectiveness,* be first submitted by the landowner to the general electorate in a referendum and receive a 55% affirmative vote?

The Supreme Court of Ohio held that such a requirement violated Section 1f of Article II of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution.

Petitioners have advanced no creditable reason for a review of that determination.

ARGUMENT

1. This case does not present a federal question of substance for the reason that the decision of the Supreme Court of Ohio was based upon alternative state and federal grounds, either of which will support the decision.

The decision[1] of the Supreme Court of Ohio was based upon two separate grounds. The first ground was set forth in paragraph one of the syllabus[2] of the Court as follows:

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1. The syllabus and opinion of the Supreme Court of Ohio are set forth in full at Appendix A to the Petition in this case. The case is officially reported as *Forest City Enterprises v. Eastlake,* 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975).

2. The syllabus in cases considered by the Supreme Court of Ohio is prepared by the Court and is the statement of the law upon which the decision was reached. See *Beck v. Ohio,* 379 U.S. 89, 93 n.2 (1964); *Cassidy v. Glossip,* 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967).

1. Under Section 1f of Article II of the Ohio Constitution, municipal referendum powers are limited to questions which municipalities are "authorized by law to control by legislative action." (Paragraph one of the syllabus in *Myers v. Schiering,* 27 Ohio St. 2d 11, approved and followed.)

In the body of the opinion, Mr. Justice Brown, writing for a majority of the Ohio Supreme Court, noted that while the power to zone or rezone through the passage or amendment of a comprehensive zoning ordinance is clearly a legislative function, "[g]rants of relief from unnecessary hardship . . . are classified as administrative acts, regardless of the label placed on them." 41 Ohio St. at 190, 324 N.E.2d at 743. Administrative acts were characterized as being those which execute or administer a zoning ordinance, rather than bringing one into existence. The opinion reaffirms the principle that, in Ohio, the power of referendum does not extend to administrative acts.[3]

Article VIII, Section 3 of the Eastlake Charter[4] sets forth that "any change" in existing land use or "any change whatsoever to any ordinance" or "the enactment of any ordinance" affecting the use of land is subject to the mandatory referendum procedure. All changes in land use thus fall within the requirement of a mandatory referendum regardless of whether they are classified as administrative or legislative. In encompassing administrative acts, this Charter provision is clearly invalid under Section 1f of Article II of the Ohio Constitution and was held to be so by the Supreme Court of Ohio in paragraph one of its syllabus.

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3. *Myers v. Schiering,* 27 Ohio St. 2d 11, 271 N.E.2d 864 (1971).

4. The text of Article VIII, Section 3, of The Eastlake Charter is set forth in full at page 50 of Appendix D to the Petition in this case.

While the Supreme Court of Ohio then went further to consider the due process infirmities of the mandatory referendum requirement as applied to legislative acts, the Court could justifiably have stopped with its initial holding. The Charter provisions are clearly not separable so as to enable a Court to hold a part of them invalid, while saving the rest.[5] Thus, even without the federal due process ground, the provision of the Eastlake Charter for a mandatory referendum, with a 55% favorable vote required on every land use change, must necessarily fail in its entirety due to the limitations on referenda under the Ohio Constitution.

This Court has long held that where the judgment of a state court rests upon two independent grounds, one of which is federal and the other non-federal, there is no jurisdiction to review the state court judgment. *See, e.g., Jankovich v. Indiana Toll Road Comm'n.*, 379 U.S. 487 (1965). This is clearly such a case and for that reason the Petition for Writ of Certiorari should be denied.

2. The Ohio court correctly applied established precedent of this Court in finding that the mandatory referendum procedure required by the Eastlake Charter was violative of the due process clause of the Fourteenth Amendment.

Section 3 of Article VIII of the Eastlake Charter requires that all changes in existing land uses, whether through zoning or otherwise, as a condition to becoming effective, shall first be subjected to a referendum and shall receive from the general electorate a 55% affirmative vote of approval.

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5. If a challenged statute is not separable and a part of it is found to be unconstitutional, the statute must fail in its entirety. *Board of Election v. State*, 128 Ohio St. 273, 191 N.E. 115 (1934).

This Court has considered and held unconstitutional substantially similar legislation. *Eubank v. City of Richmond*, 226 U.S. 137 (1912), involved an ordinance which provided that upon request of two-thirds of the owners of property abutting any street, a building line would be established along the street. A landowner, whose dwelling violated a building line thus established, challenged the constitutionality of the ordinance on the ground that it embodied an unlawful delegation of legislative authority depriving the landowner of his property without due process. This Court agreed. It is constitutionally objectionable, the Court held, for one set of landowners to determine and control the use which another landowner might make of his property without providing appropriate standards by which the power is to be exercised. As the Court observed, "even so arbitrary a thing as taste" might control the decision. 226 U.S. at 144.

Similarly, in *Washington, ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), the trustee of a home for the aged sought to replace an existing building with an enlarged structure. A Seattle ordinance, amending the City's comprehensive zoning scheme, permitted the erection of the structure as contemplated, but made such approval subject to the trustee's obtaining the written consent of two-thirds of the adjacent landowners. The trustee was unable to obtain the required consents and challenged the validity of the ordinance. This Court held that the consent requirement constituted an unlawful delegation of legislative power.

Due process requires that use of property be controlled by a responsible legislative organ of government, and not the uncontrolled whim of a minority of electors; and the Supreme Court of Ohio so recognized in this case:

> Due process of law requires that procedures for the exercise of municipal power be structured such that fundamental choices among competing municipal policies are resolved by a responsible organ of government. It also requires that a municipality protect individuals against the arbitrary exercise of municipal power, by assuring that fundamental policy choices underlying the exercise of that power are articulated by some responsible organ of municipal government. *McGautha v. California,* (1971) 402 U.S. 183, 256, 270. . . . 41 Ohio St. at 196, 324 N.E.2d at 746.

Applying the principles of these cases, the Supreme Court of Ohio found that under the mandatory referendum procedures of the Eastlake Charter, zoning policies would not be "articulated" by a responsible organ of government but were left to the unfettered whim of a minority of the voters. There is no substantial distinction between this case and the procedure condemned in *Eubank* and *Roberge.*[6] In this instance 46% of the electors, acting not as a legislative body constituted in an open meeting but anonymously and unguided by any standards, may thwart the reasoned decision of the elected legislators made in light of the overall zoning plan. Clearly this is an unconstitutional delegation of legislative authority violative of the due process clause of the Fourteenth Amendment.

Nor, as petitioners urge, does *James v. Valtierra,* 402 U.S. 137 (1971), require a different result. *Valtierra,* as the Ohio Supreme Court noted, did not concern zoning, but rather the development, construction or acquisition of low-rent housing by public bodies. The California Supreme Court had earlier held that the actions of local housing

6. See also, *Schulte v. Garnett,* 186 Kan. 117, 348 P.2d 629 (1960); *In re Hetrick's Appeal,* 391 Pa. 148, 137 A.2d 310 (1958).

authorities, established to take advantage of federal financing for low-rent housing, were not subject to the California Constitution's referendum provisions. Within six months the California Constitution was amended to provide that no low-rent housing project might be developed, constructed or acquired by any public body until the project had been approved at a referendum election.

Citizens claiming they qualified for low-rent housing challenged the referendum requirement on the basis that it effectively deprived them of low-rent housing and was therefore violative of the Supremacy Clause, the Privileges and Immunities Clause and the Equal Protection Clause. There was no due process claim at issue. In upholding the referendum requirement Mr. Justice Black, speaking for this Court, drew the distinction critical to an understanding of *Valtierra*:

> [Referendum approval of low-rent public housing projects] ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. . . . 402 U.S. 137, 143.

There is no comparison between the issues presented in *Valtierra* and those presented in this case. In *Valtierra* there was no denial of due process to a specific property owner, but rather a claimed denial of equal protection to an undefined group.

Moreover, the issues made subject to referendum in *Valtierra* clearly related to public policies which would surely impact the entire community by reason of the expenditure of public funds and the lowering of tax revenues. In the present case, on the other hand, all land use decisions, no matter how insignificant or lacking in com-

munity-wide interest, must be presented to the community at large and be approved by 55% of the voting electorate. Such land use decisions, while directly and immediately affecting the particular property owner involved, invoke no basis for community-wide policy making.

It was for these reasons that the Supreme Court of Ohio recognized *Valtierra* as inapplicable and *Eubank* and *Roberge* as controlling on the due process issue.

3. The Decision of the Supreme Court of Ohio is in accord with other constitutional principles.

Since 1926 when this Court decided *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), it has been indisputable that zoning is an appropriate expression of the police power. Underlying such impingements on an individual's free use of his property, however, are the concomitant constitutional principles that restrictive zoning provisions must bear a substantial relation to *public* health, safety, morals or general welfare *and* that they not be clearly arbitrary and unreasonable.

These constitutional principles play no part in the decision making process under the Eastlake Charter. Any zoning change—no matter how insignificant (or meaningful) to the community at large; no matter how intimately related to the community's comprehensive zoning plan; no matter how thoroughly and expertly considered by the municipal planning commission and adopted, even unanimously, by the legislative council—such an approved change is *wholly ineffective* unless and until the individual property owner places the issue of his zoning change on the ballot and obtains a 55% vote of approval.

Or, stated obversely, a 46% minority of those who happen to vote can frustrate a change in use which has

been fully validated by the city's planning and legislative process; and this unidentifiable minority may do so without the restraint of public duty or accountability to any authority, on the basis of mere whim or caprice, and without the benefit of experience, of knowledge of the facts or of exposure to proper standards for judgment.

"In what way", as this Court said in *Eubank*, "is the public safety, convenience or welfare served by conferring such power?" 226 U.S. at 143. This is not "democracy", as petitioners so blithely aver, but anarchy; and it strikes at every constitutional principle for the exercise of police power which undergirded the original decision in *Euclid v. Ambler*.

What then is the true meaning and objective of this Eastlake Charter provision?

Justice Stern, in his concurring opinion below, put his finger on the real issue: This so-called referendum procedure is intended

> . . . to obstruct change in land use, by rendering such change so burdensome as to be prohibitive. . . .
>
> There is no subtlety to this; it is simply an attempt to render change difficult and expensive under the guise of popular democracy.
>
> . . . .
>
> Zoning provisions such as that in Eastlake's Charter have a single motive, and that is to exclude, to build walls against the ills, poverty, racial strife, and the people themselves, of our urban areas. . . . 41 Ohio St. at 199, 200, 324 N.E.2d at 748, 749.

And there is no denying the awesome truth of these insights for petitioner concedes that no less than seventeen

outlying communities have ringed Cleveland and its mature suburbs with Eastlake type restrictions—a veritable choke collar against change in the large lot, single family, residential use predominating in these restrictive communities.

Planning for community land use is a complex and important task. The desires of a suburban community to be free from what it may feel are undesirable land uses must be balanced against the needs of the wider geographical area for multiple types of housing and commercial uses. Change, not stagnation, is the signal characteristic of our society; and comprehensive land use plans which fail to provide adequately for various types of land uses are increasingly being struck down by the courts.[7]

Against the requirement for comprehensive planning is set the Eastlake mandatory referendum procedure by which the electorate may reject, for whatever reason or no reason, any changes, including those necessary to preserve the constitutional validity of the zoning ordinance. There is no practicable remedy other than the Constitution left to a landowner aggrieved by such a pseudo referendum provision.

In view of these burdens, unrelated as they are to police power standards, Eastlake's mandatory referendum procedure cannot be said to be founded on "neutral" principles, as petitioners urge, but rather it embodies a systematic infringement on the property rights of those landowners seeking to make a better, and perhaps constitutionally mandated, use of their land. Eastlake's Charter provision is thus impermissible under *Euclid v. Ambler* and its multitude of progeny.

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7. *See e.g., Southern Burlington City N.A.A.C.P. v. Tp. of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975); *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970).

CONCLUSION

No matter how viewed—whether as based on alternative state and federal grounds or as applying with fidelity the established precedent of this Court—the judgment of the Supreme Court of Ohio which struck down Eastlake's innovative attempt to preclude land use change is not deserving of further review by this Court.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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